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714-554—63——1

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

NATHAN MANN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals reversing respondent's conviction under Section 7201 of the Internal Revenue Code of 1954. This application is conditional upon the Court's granting a writ in No. 519, discussed *infra*.

OPINION BELOW

The opinion of the Court of Appeals (App., *infra*, pp. 11–22) is reported at 319 F. 2d 404.

JURISDICTION

The judgment of the Court of Appeals (App., *infra*, p. 23) was entered on June 25, 1963. A petition for rehearing was denied on October 9, 1963. By an order dated November 7, 1963, Mr. Justice Black granted an application by the United States

for an extension of time to December 6, 1963, to file a petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the trial court committed plain error in instructing the jury, at the request of the defendant, that it might infer that the defendant intended the natural and probable consequences of his conscious acts.

STATUTE AND RULES INVOLVED

Internal Revenue Code of 1954:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.
>
> (26 U.S.C. 1958 ed., Sec. 7201.)

Federal Rules of Criminal Procedure:

> RULE 30. INSTRUCTIONS
>
> * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *.
>
> RULE 52. HARMLESS ERROR AND PLAIN ERROR
>
> (a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

On March 6, 1961, a three-count indictment was returned in the United States District Court for the Southern District of Texas charging respondent with wilful attempted evasion of income taxes for the years 1954 through 1956, in violation of Section 7201 of the Internal Revenue Code of 1954. The indictment alleged that, for the three years involved, respondent had failed to report $34,596.36 in income and had attempted to evade taxes in the amount of $8,548.47. (R. 4–7.)[1] The jury returned a verdict of guilty as charged, and respondent was sentenced to imprisonment for two years and fined $6,000. (R. 481–482.)

The evidence showed that respondent, a physician, collected most of his fees and reported them to his bookkeeper for entry in a daily log (R. 148–150, 165–166, 169–181, 184–187, 200, 440–442); that the accountant who prepared respondent's returns relied on information obtained from this daily log (R. 79, 89–91, 426–429); and that the actual fees received from numerous patients were much larger than the amounts recorded in the daily log (R. 112–131, 212–219). Upon discovery of this, the examining agent analyzed respondent's bank deposits and established the amounts of unreported income. (R. 254–264.) Respondent admitted that his returns were incorrect but blamed it on his accountant. (R. 17.)

[1] "R." references are to the record in the court of appeals.

The evidence also showed that respondent purchased over $15,000 worth of Series "E" Savings Bonds during the years involved, making payment by cash or by endorsing checks received from third parties. (R. 138–142.) When questioned during the revenue agent's investigation, he could remember purchasing only $1,000 worth of such bonds. (R. 248–249.) At the trial he claimed he bought the bonds with gifts received from his father (R. 377–380), but this was refuted by his use of third party checks and by previous contradictory statements to the agent as to gifts from his father. (R. 141, 224, 231–232, 239–243, 250–251.)

After both sides had rested, the trial judge inquired whether there were any requests for instructions. Counsel for respondent replied that he had listened to the judge's charge in a previous case,[2] that he had had it transcribed, and that he would be satisfied if the same instructions on specific intent were given in the present case. (R. 447–448.) He concluded (R. 448):

> * * * I was going to make some requests for charges on the point of specific intent, but the charge that you gave in the Berry case in that respect if given in this case, I have no requests or no objections.

The trial judge agreed (R. 448), and he gave a charge on specific intent identical with that given in

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[2] *United States* v. *Lawrence E. Berry*, Cr. No. 6332 (S.D. Tex.). The instruction in the *Berry* case, which also involved a charge of income tax evasion, has been made a part of the present record.

Berry (R. 461–464) and including the following four paragraphs (R. 463–464):

> The intent involved in this offense and required to be shown is not proved merely by filing a return that is false, but requires the specific intent on the part of the defendant involving bad purpose and evil motive, and that specific intent must be clearly inferred from the evidence and you must so find from the evidence beyond a reasonable doubt.
>
> Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye-witness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.
>
> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.
>
> In determining the issue as to intent, the jury is entitled to consider any statements made and acts done or omitted by the accused, and

all facts and circumstances in evidence which may aid in determining state of mind.

These four paragraphs were preceded by instructions on the distinction between direct and circumstantial evidence (R. 456–457), as well as the distinction between an inference and a presumption (R. 457–458); and they were both preceded and followed by additional instructions as to the nature of the specific intent to be proved in a case of this type (R. 461–463, 464–466, 466–467, 468–469). Counsel for respondent stated that he had no objections at the conclusion of the charge (R. 474, 476), and he found no fault with it in his motion for new trial (R. 482–483).

The court of appeals found the evidence sufficient to support the verdict, but reversed respondent's conviction on the ground that the trial judge had committed plain error in giving the third paragraph of the passage just quoted from the instruction (App. *infra*, pp. 12, 15–22).

REASONS FOR GRANTING THE WRIT

The portion of the instruction which the court below held to be plain error reads as follows:

> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

We submit that this instruction was both correct and entirely consistent with the decisions cited by the court below in support of its action (App., p. 18). The instruction eliminated the only two failings of the instructions condemned in *Wardlaw* v. *United States*, 203 F. 2d 884 (C.A. 5); *Berkovitz* v. *United States*, 213 F. 2d 468 (C.A. 5);[3] and *Bloch* v. *United States*, 221 F. 2d 786 (C.A. 9).[4] First, it deleted any reference to a *presumption* of a guilty intent; it stated only what inferences the jury "may draw" and even limited these by adding, "unless the contrary appears from the evidence." Secondly, the instruction here did not state that the specific intent to evade taxes could even be inferred from the mere omission of items of gross income.

The first part of the instruction simply repeated what has been, for many years, the standard instruction on circumstantial evidence of intent—that a man generally intends the normal consequences of his

[3] The instruction in *Wardlaw* and *Berkovitz* stated:

> The presumption is that a person intends the natural consequences of his conscious acts, and a natural presumption would be if a person consciously, knowingly, or intentionally did not set up his income, and thereby the Government was cheated or defrauded of taxes; that he intended to defeat the tax.

[4] The instruction in *Bloch* stated:

> The presumption is that a person intends the natural consequences of his acts, and the natural inference would be if a person consciously, knowingly and intentionally did not set up his income, and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax.

acts.[5] The instruction is as necessary and proper in a prosecution for tax evasion as in any other case. The normal consequence intended in omitting large amounts of income from a tax return is that the income will not be taxed. To this intent that certain items should not be taxed must be added a knowledge that they were taxable in order to find the element of wilful intent to evade taxes which is necessary for a violation of the statute. Whether it is reasonable to infer that the defendant knew that the omitted items of income were taxable depends upon all the evidence, including the defendant's education and experience, his treatment of other identical items, the size and character of the income, and any conduct suggesting or belying guilty knowledge. The instruction also covered this point fully and fairly. Unless the contrary appears from the evidence, the court charged, "the jury *may* draw the inference that the accused intended all of the consequences which one *standing in like circumstances and possessing like knowledge* should reasonably have expected to result * * *." (Emphasis supplied.) The instruction was well attuned to the evidence. The evidence tended to prove that large amounts of income were understated or withheld, that defendant caused his bookkeeper to keep an incomplete and inaccurate daily log, and that

[5] See, *e.g.*, *Allen* v. *United States*, 164 U.S. 492, 498; *Agnew* v. *United States*, 165 U.S. 36, 53; *Debs* v. *United States*, 249 U.S. 211, 216; *Cramer* v. *United States*, 325 U.S. 1, 31; *Crews* v. *United States*, 160 F. 2d 746, 750 (C.A. 5); *Myres* v. *United States*, 174 F. 2d 329, 334 (C.A. 8); *Koehler* v. *United States*, 189 F. 2d 711, 714 (C.A. 5), certiorari denied, 342 U.S. 852.

other amounts, identical to those omitted from petitioner's return, were listed on his return. Manifestly, it was these "acts" and "circumstances" and "knowledge" in the light of which the instruction permitted the inference of a guilty intent to be drawn.

At least on the surface, the decision below conflicts with a recent decision of the Ninth Circuit in *Sherwin* v. *United States*, 320 F. 2d 137. There, an identical instruction was given in a nearly identical context of accompanying instructions. At the *Sherwin* trial, there was an objection; but the Ninth Circuit ruled that, in view of the context in which the instruction appeared, "we cannot do otherwise than hold * * * that [it] * * * could not have been prejudicial or have misled the jury." Here, however, despite the fact that respondent actually requested the instruction and never expressed dissatisfaction in the trial court, the Fifth Circuit held it to be plain error.

Despite the surface conflict, we do not urge that review by this Court is imperative. Identical instructions upon circumstantial evidence of intent may take on different significance in the context of different trials. There was little similarity in the evidence at these two trials. There is, therefore, no necessary inconsistency in the rulings and no inevitable unfairness to one of the parties. For the same reason, it is far from clear that review on certiorari would give further guidance to the lower courts in an area where the general principles are already well established. If the objections that the Fifth Circuit has noted to this instruction have application beyond this particular

case, the problem can be met in future trials by a revision of the instructions requested, limiting the effect of the Fifth Circuit's decision and of the conflict between the circuits to cases now pending in the courts of appeals after trial.

For these reasons, we have opposed the petition for a writ of certiorari in *Sherwin* v. *United States, supra,* No. 519, this Term. For the same reasons, we do not contend that further review of this case is necessary. However, if this Court should determine that review of this issue is appropriate in the *Sherwin* case, we respectfully submit that certiorari should be granted in this case as well, since the identical instruction is involved in both cases.

CONCLUSION

It is respectfully submitted that this petition should be granted in the event that the writ is granted in *Sherwin* v. *United States,* No. 519, this Term.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

JOSEPH M. HOWARD,
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Attorneys.

DECEMBER 1963.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19544

NATHAN MANN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(June 25, 1963)

Before HUTCHESON, WISDOM and GEWIN, Circuit Judges

GEWIN, Circuit Judge: This is an appeal from a judgment of conviction entered upon a jury verdict finding appellant, Nathan Mann, M.D., guilty of wilfully attempting to defeat or evade payment of income taxes owed by him and his wife for the years 1954, 1955 and 1956, in violation of 26 U.S.C.A., 7201.[1] Dr.

[1] This statute provides as follows: "any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other

Mann was indicted on three counts, each involving one of the years in question. He contends that the evidence against him was insufficient to sustain the conviction, and that the instructions on wilfulness in the oral charge of the trial judge were fundamentally erroneous. Doctor Mann resided in Corpus Christi, Texas, where he conducted a general medical practice treating patients both in and out of his office.

The Government contends that for each year in question the unreported taxable income of Dr. Mann was reflected in two ways. First, there were amounts of unreported income reflected by his bank deposits; and second, that unreported income was reflected by bond purchases made by Dr. Mann with money not taken from his bank account. While admitting the existence of the unreported taxable income as reflected by his bank deposits, Dr. Mann denies that he wilfully omitted income from his return, and contends that such omission was due to the inefficiency and negligence of his accountant.

As to the money used for buying the bonds, Dr. Mann claims, and this is corroborated by his wife, that the money came from cash gifts chiefly[2] from his father, and therefore, his omission of this money was not wilful evasion since these claimed gifts were not taxable. The jury did not accept his explanation, but found him guilty as charged. As to Dr. Mann's first contention, we hold that there was sufficient evidence of his guilt to support the jury's verdict, and

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penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than five years, or both, together with the costs of prosecution."

[2] Some gifts from others were also claimed, including Dr. Mann's father-in-law.

the refusal to grant the motion for acquittal was not error.

Doctor Mann's bookkeeping system consisted of the maintenance of three separate books of entry including a "Daily Log" in which cash payments on account and the charges to patients' accounts were recorded; a "Journal" kept as a single entry book, to which were posted from the Daily Log receipts from patients, deposits to the bank account and checks drawn thereon; and a subsidiary ledger also showing charges to patients' accounts and their payments made against these charges, these figures also being taken directly from the Daily Log.

The Daily Log, according to Otto Kuehn, the accountant who did Dr. Mann's tax work, was the core of the doctor's accounting system. The failure to note a transaction or collection in the Daily Log would inevitably lead to its not being reported in Dr. Mann's income tax. There was testimony that Dr. Mann usually made the collections and reported them to the bookkeeper for posting in the Daily Log; and in many instances he posted the collections himself.

Certain exhibits introduced by the Government show that Dr. Mann made up the bank deposits, put them in the bank himself and the secretary posted the totals from the deposit slips as a credit to the Journal "Cash" account and a debit to the Journal "Bank" account. The "Fee" column from the Journal and data on rent, dividends and interest, separately supplied by Dr. Mann himself, were the sources of information from which Accountant Kuehn prepared the tax returns. The accountant, having no knowledge of the substance of the transactions reflected in the Daily Log as posted to the Journal,

depended entirely upon information supplied by Dr. Mann or his office.

A special agent of the Internal Revenue Service began investigating Dr. Mann's accounts on February 25, 1958. The agent obtained the Journals, Daily Log, some other materials and familiarized himself with the internal procedures of Dr. Mann's medical office. This agent contacted thirty-five of Dr. Mann's patients of which six or eight furnished him with a reasonably complete record of their cash payments to Dr. Mann. In all cases the amount that the patient had actually paid was higher than the amount shown to have been paid, and recorded on the Daily Log. Then the agent analyzed Dr. Mann's bank deposits and came to the conclusion that his income tax returns did not reflect his true income.

A recent case by this court dealing with the sufficiency of the evidence to establish wilfullness in income tax cases is *Windisch* v. *United States,* 5 Cir., 1961, 295 F. 2d 531. Windisch contended that tax evasion cannot be established merely by showing that the taxpayer failed to include items of income in his return. The Court said in affirming:

> The principle is correctly stated, but the cases are distinguishable from the instant case. Unlike Pechenik, for example, Windisch omitted specific items of income earned, the accountant was not engaged to make an audit, and the accountant relied upon Windisch to supply the necessary tax information as to income as well as expenditures. The appellant can point, as defendants have done in similar cases, to the lack of certain badges of fraud. That is not enough. The question of willfulness is for the jury. Considering the record as a whole, the evidence which was direct as well as circumstantial, supports the verdict and judgment of the district court.

As in *Windisch*, the evidence in this case was sufficient to make out a case for the jury and the jury decided the question of wilfullness.

The Government introduced evidence both direct and circumstantial to show that the bonds in question were purchased by money received from Dr. Mann's patients. The evidence was clear that Dr. Mann purchased more than $15,000.00 worth of bonds during the years in question. However, when he was questioned about the bonds by Internal Revenue Agent Moore, he could only remember purchasing two $500.00 Series "E" Savings Bonds during the years in question. It was Dr. Mann's contention that he bought the bonds from money received as a gift from his father. At the trial, the Gift Tax Returns filed by Samuel Mann, Dr. Mann's father, were introduced into evidence. They showed gifts to Oscar Mann, Dr. Mann's brother, but none to Dr. Mann himself. The bank employee from whom the bonds were purchased testified that Dr. Mann purchased the bonds with crumpled currency taken from his pockets, and with checks from third persons which he endorsed. While this evidence may not be conclusive proof of wilfullness, it was sufficient to present a jury question as to whether or not the bonds were purchased with cash gifts or unreported taxable income.

A far more complex problem is raised by Dr. Mann's second contention, which relates to the following portion of the Court's oral charge:

> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and

possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

No objection was made to the charge when given; but it is contended that it is so plainly erroneous that this court should notice the error under rule 52(b) F. R. Crim. P. The Government does not seriously contend that the above quoted portion of the charge, standing alone, is not erroneous. It claims that other portions of the charge rectified any error committed; and when the charge is read as a whole, the issue of wilfullness was fairly presented to the jury. The entire portion of the court's charge relating to wilfulness is printed in the margin.[3]

[3] "In every crime there must exist a union of joint operation of fact and intent. The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt. Specific intent must be proved before there can be a conviction. Specific intent as the term itself suggests, requires more than a mere general intent to engage in certain conduct. A person who knowingly does an act which the law forbids, or knowingly fails to do an act which the law requires, intending with evil motive or bad purpose either to disobey or to disregard the law, may be found to act with specific intent. An act or failure to act is done knowingly if done voluntarily and purposely, and not because of mistake or inadvertence or other innocent reason..

"In considering the defendant's guilt or innocence you are instructed that it must be shown beyond a reasonable doubt that the defendant, Nathan Mann, wilfully and knowingly attempted to evade taxes as charged in Counts One, Two and Three, considering each count separately, with a specific intent to evade such taxes. In our law such specific intent means more than intentional or voluntary filing of a return that may be shown to be incorrect or false, if there were any such returns filed, for it must be shown beyond a reasonable doubt that such filing was accompanied by an evil motive and wrong purpose. Otherwise, you should find him innocent.

"If you find that the defendant, Nathan Mann, acted in good faith in filing one or all of such returns as described in the

Dr. Mann argues that the effect of that portion of the charge of which he complains was to make the jury aware of a certain factual hypothesis and to instruct them that if they believed this hypothesis was established by the evidence, they were then authorized, absent opposing evidence, to infer that Dr. Mann's intent was tax evasion. This, he contends, is tantamount to an incriminating presumption which the jury, absent opposing evidence, could use as a substitute for proof. We agree.

In *Morissette* v. *United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952), the defendant, while

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indictment, you shall find him not guilty as to the one or all of such counts, considering each separately, which were accompanied by such good faith, if any.

"The intent involved in this offense and required to be shown is not proved merely by filing a return that is false, but requires the specific intent on the part of the defendant involving bad purpose and evil motive, and that specific intent must be clearly inferred from the evidence and you must so find from the evidence beyond a reasonable doubt.

"Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye-witness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

"It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

"In determining the issue as to intent, the jury is entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid in determining state of mind."

hunting on a government bombing range, carried away and sold three tons of used bomb casings. He was prosecuted for knowingly converting government property to his own use. The trial court refused to submit the question of wilfulness to the jury, holding that such intent was "presumed" from the defendant's act. In reversing the conviction, the court stated:

> We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit.

Identical charges, strikingly similar to the charge under consideration in the instant case, were involved in three cases, two of which were decided by this court. *Berkovitz* v. *United States*, 5 Cir., 1954, 213 F. 2d 468; *Wardlaw* v. *United States*, 5 Cir, 1953, 203 F. 2d 884; *Bloch* v. *United States*, 9 Cir., 1955, 221 F. 2d 786. In all three cases the court charged:

> The presumption is that a person intends the natural consequences of his acts, and the nat-

> ural presumption would be if a person consciously, knowingly, or intentionally did not set up his income and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax.

Convictions in all three cases were reversed on appeal. The opinions held that the effect of the charge was to tell the jury that it could draw the conclusion that the defendant intended to defeat the payment of the tax from the mere fact that an incorrect return was filed; and resulted in a shifting of the burden of proof from the Government to the defendant. As stated in *Berkovitz* with reference to the charge:

> It had, of course, told the jury in other parts of the charge that the defendant was presumed to be innocent until proved guilty beyond a reasonable doubt with full elucidation of what this meant. However, the error was in telling them that as a matter of law they could presume criminal intent from the circumstances described in the questioned charge, without at the same time telling them they must consider all the evidence including that offered by defendant to disprove that intent, that the burden of proof never shifted and the Government, in spite of those circumstances, was required to prove the guilt of defendant beyond a reasonable doubt.

The instructions in the instant case go beyond the bounds of the charge set out in the above cited cases. If the charge had ended when the jury was told that a person is presumed to intend the natural consequences of his own acts, when considered in the light of the charge as a whole, there would have been no error. When the words, "So unless the contrary appears from the evidence" were introduced, the burden of proof was thereupon shifted from the prosecution to the defendant to prove lack of intent. If an in-

ference from a fact or set of facts must be overcome with opposing evidence, then the inference becomes a presumption and places a burden on the accused to overcome that presumption. Such a burden is especially harmful when a person is required to overcome a presumption as to anything subjective, such as intent or wilfullness, and a barrier almost impossible to hurdle results.

The quoted charge is subject to another vice. The statute involved, 26 U.S.C.A. § 7201, specifically provides that the crime of income tax evasion must be accompanied by a specific intent on the part of the accused to defeat or evade the tax, which must be proved by independent evidence. *Spies* v. *United States*, 317 U.S. 492, 87 L. Ed. 418 (1943). Under the instruction here involved, the jury is invited to speculate as to what any other person similarly situated to Dr. Mann and with like knowledge, would reasonably have expected to be the consequences of the conduct under consideration as shown by the evidence. The test is whether Dr. Mann himself wilfully attempted to evade or defeat the tax. The following charge was condemned in *Chappell* v. *United States*, 9 Cir., 1959, 270 F. 2d 274.

> Criminal intent is a necessary ingredient of the crime charged in the indictment, and before a verdict of guilty may be rendered you must find from the evidence, beyond a reasonable doubt, that the defendant intended to commit the offense against the United States charged in the indictment. In this connection, you are instructed that every person is presumed to intend the natural consequences of his own voluntary and deliberate acts. One who voluntarily and deliberately performs an act which, from our common experience, is known to produce a particular result, may be presumed to have anticipated and intended that result.

The court held that the quoted charge conflicted with the overriding presumption of innocence with which the accused is endowed under the law.

Our attention is called to the case of *Bernstein* v. *United States*, 5 Cir., 1956, 234 F. 2d 475, in which it was said that every charge of a presumption other than that of innocence is not reversible error in a criminal trial. It is not our holding that every charge using the word "presumption" is reversible error. We do hold that it is error to give a charge in a criminal case of this nature, the overall effect of which is to place a burden upon the defendant to produce evidence to overcome a presumption of guilt.

We are not unmindful of the case of *Legatos* v. *United States*, 9 Cir., 1955, 222 F. 2d 678, and *Windisch* v. *United States*, *supra*, which hold that when a charge as a whole fairly gives the law to the jury on the necessity of wilfulness in an income tax evasion case, that one isolated part of the charge that a person is presumed to intend the natural consequences of his acts, does not constitute prejudicial error. Even though the trial judge did give an accurate charge on the necessity of intent and the burden of proof, we hold that to leave the jury with that part of the charge complained of in this case was not cured by what was said elsewhere in the charge. Instructions to the jury must be consistent and not misleading. The fact that one instruction is correct does not cure error in giving another inconsistent one. *Perez* v. *United States*, 5 Cir., 1961, 297 F. 2d 12.

Counsel for Dr. Mann did not object to the charge as required by Rule 30 F.R. Crim. P. The sole defense of Dr. Mann was his contention that he did not intend to evade or defeat the tax imposed; and he denied that his conduct was wilful or that he had any evil motive or intent to defraud. We think that an

error affecting such a vital aspect of the case is fundamental. Rule 52(b) F.R. Crim. P. provides:

> Plain Error: Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

As stated in *Bloch:* "The error of the trial court is * * * fundamental and goes to the very essence of the case, so we must under the rule take notice of it". As emphasized in *Perez,* it is never permissible to leave the jury with the idea that it becomes the duty of the defendant to establish his innocence. The charge in this case could very well have had that effect, and as such, we cannot allow the conviction to stand.

For the foregoing reasons, the judgment of the conviction on all three counts is REVERSED and the case is REMANDED for a new trial.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1962

No. 19544

D.C. Docket No. 6372 Crim.

NATHAN MANN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Before HUTCHESON, WISDOM and GEWIN, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of conviction on all three counts in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for a new trial.

JUNE 25, 1963.

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NO. 662

IN THE

Supreme Court of the United States

October Term 1963

UNITED STATES OF AMERICA, *Petitioner*

v.

NATHAN MANN, *Respondent*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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MAY IT PLEASE THE COURT:

QUESTION PRESENTED

Petitioner states the case correctly except that the QUESTION PRESENTED is not correctly stated.

The question presented is not, as petitioner suggests, whether error was committed by the trial court's giving the portion of its instructions which advised the jury

they might infer that defendant intended the natural and probable consequences of his conscious acts. Respondent did not complain of that portion of the instructions and the Court of Appeals expressly held that no error would have been committed had such instructions stood alone.

The thing that made the error was the inclusion in the charge of additional language operating to permit the jury to infer wilful intent from a certain factual hypothesis therein set forth unless respondent came forward with opposing evidence.

Premises considered, we respectfully submit that the QUESTION PRESENTED is as follows:

> Whether plain error was committed by the giving of instructions advising the jury in effect that, upon their believing that any person similarly situated to respondent and with like knowledge would reasonably have expected tax exasion to be a consequence of the conduct of his shown by the evidence, they were authorized, absent opposing evidence, to infer that his intent was tax evasion.

REASONS FOR DENYING THE WRIT

The question presented is foreclosed by previous decisions of this Court.

Morissette v. United States, 342 U.S. 246 (1952) is in point. It establishes that an instruction charges on presumptive intent when it does what the complained of instruction did, i.e. when it assumes a certain isolated factual hypothesis and tells the jury they may infer intent on finding the hypothesis true. An instruction of that kind has the effect of instructing the jury that the

law raises a presumption of intent from the hypothesized facts if they be found true and that the jury may act on this presumption UNLESS THE DEFENDANT COMES FORWARD WITH OPPOSING EVIDENCE. Concerning such an instruction this Court in *Morissette* held as follows:

> ". . . the trial court may not . . . prejudge the issue [of intent] by instruction that the law raises a presumption of intent from an act."

This Court also held in that case that one of the "incriminating presumptions" which may not properly be "improvised by the judiciary" is

> "a presumption which would permit but not require the jury to assume intent from an isolated fact."

Tot v. United States, 319 U.S. 463 (1943) is also in point. Under the federal statute there involved proof that defendant had possession of a firearm was made "presumptive" evidence of the ultimate fact of shipment, transportation or receipt of the firearm in violation of the statute. The presumption created by this statute was one of fact, i.e. an inference permitted to be drawn by the jury from particular facts. This Court invalidated the statute because, inter alia, it left the jury free

> "to act on the presumption [i.e. inference] alone once the specified facts are proved unless the defendant comes forward with opposing evidence."

This reasoning applies here. The complained of instruction called the jury's attention to a certain factual hypothesis they were at liberty to find or not find (to wit,

the hypothesis that a person similarly situated to respondent and with like knowledge would reasonably have expected tax evasion to be a consequence of the conduct of respondent shown by the evidence) and advised them that if they found the hypothesis true then they were authorized, absent opposing evidence, to draw an inference that respondent's intent was tax evasion. The effect of the instruction was to tell the jury that, upon their finding such hypothesis true, they then could infer intent unless the defendant came forward with opposing evidence. Such an effect, under the holding in *Tot*, could not be produced even by statute, and the court below was clearly correct in its decision that the language in the complained of instruction seeking to produce such effect was fundamentally erroneous. To give approval to such an instruction would be to shift from the prosecution to the defendant the burden of proving lack of criminal intent.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted

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December, 1963